

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EUNICE RIVERA, et al. : CIVIL ACTION
:
v. :
:
CITY OF PHILADELPHIA, et al. : NO. 97-CV-1130

MEMORANDUM AND ORDER

J. M. KELLY, J.

February , 1998

The following motions are presently before the Court:

(1) Plaintiffs Eunice Rivera ("Rivera") and Viola Gambrell's ("Gambrell") Petitions for Reimbursement of Costs, Inclusive of Attorneys Fees; (2) Defendant City of Philadelphia's ("the City") Petition for Payment of Attorneys' Fees; and (3) Plaintiff Verna Lee Jewell's ("Jewell") Request to Voluntarily Discontinue Her Claim With Prejudice. In addition, the Court must consider its supplemental jurisdiction over a state law negligence claim asserted by Rivera against the City.

BACKGROUND

Plaintiffs Rivera, Gambrell and Jewell brought this action against Defendants Delta Airlines, Inc. ("Delta") and the City. The Plaintiffs claimed that they are qualified individuals with disabilities and that the Defendants failed to provide them with the reasonable accommodations that they needed to board an airplane. Rivera also alleged that she fell and was injured as she was attempting to board the airplane. Each of the Plaintiffs asserted claims against the City under Title II of the Americans

With Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA") and 42 U.S.C. § 1983, and against Delta under the Air Carriers Access Act, 49 U.S.C. § 41705 ("ACAA"). Rivera also brought negligence claims against both Defendants.

On September 26, 1997, I dismissed the ADA claims against the City. I refused to dismiss the ACAA claims against Delta or the negligence claims. Jewell subsequently sought leave to voluntarily discontinue her claim. Delta agreed, but the City opposed the motion. Rivera and Gambrell then accepted offers of judgment made by Delta in accordance with Rule 68 of the Federal Rules of Civil Procedure.

DISCUSSION

I. Plaintiffs Rivera and Gambrell's Petition For Costs, Including Attorneys' Fees

Rivera accepted a \$5,000 offer of judgment and Gambrell accepted a \$1,000 offer of judgment. Delta made the offers in accordance with Rule 68. Rivera now seeks \$5,703.76 in costs and \$18,443.10 in attorneys' fees. Gambrell seeks \$352.20 in costs and \$5,250.00 in attorneys' fees. Delta's offers were silent as to costs and attorneys' fees.

If a Rule 68 offer of judgment does not address costs, the party accepting the offer is entitled to reasonable costs.¹ Marek v. Chesney, 473 U.S. 1, 6 (1985). "The term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute." Id. at 9.

A. Costs

Rivera requests \$5,703.76 and Gambrell requests \$352.20 for costs, other than attorneys' fees. Delta objects to Plaintiffs' request for reimbursement of expert witness fees, online research, postage, delivery and parking charges.

The ACAA does not address costs. Therefore, 28 U.S.C. § 1920 controls the reimbursement of costs.² Parkes v. Hall, 906

¹ Rule 68 provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

² 28 U.S.C. § 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and

(continued...)

F.2d 658, 660 (11th Cir. 1990). Section 1920 does not provide for reimbursement of expert witness fees, online research, postage, delivery or parking charges. In the absence of "explicit statutory authority" these charges will not be taxed as costs. In re Philadelphia Mortgage Trust, 930 F.2d 306, 307 (3d Cir. 1991).

Delta did not object to the other costs submitted by the Plaintiffs. Therefore, Rivera is entitled to \$2,091.40 and Gambrell is entitled to \$333.20 for costs.

B. Attorneys' Fees

Under Rule 68, attorneys' fees are recoverable as "costs" if the underlying statute defines "costs" to include attorneys' fees. Marek, 473 U.S. at 9; Chambers v. Manning, 169 F.R.D. 5, 8 (D. Conn. 1996). The ACAA does not provide for the recovery of attorneys' fees. The Plaintiffs argue that the Court should compare the ACAA to other antidiscrimination and civil rights statutes and imply a right to attorney's fees. They contend that Congress's intent "was to allow private plaintiffs to recover all necessary and appropriate remedies."

²(...continued)
witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

The "American Rule" mandates that litigants pay their own attorneys' fees. Marek, 473 U.S. at 8; Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y, 420 U.S. 240, 247-62 (1975) (discussing history of "American Rule" on attorneys' fees). Congress has made many exceptions to this default rule. See, e.g., 42 U.S.C. § 1988(b); 42 U.S.C. § 12205. In general, Congress enacts fee-shifting provisions to encourage attorneys to undertake representations that Congress deems important, but would not be profitable in the normal marketplace.

"[T]he circumstances under which attorneys' fees are to be awarded . . . [is a matter] for Congress to determine." Alyeska, 421 U.S. at 262. There are two long recognized exceptions: (1) a court may award attorneys' fees to the trustee of a fund or property, or to an attorney that preserves or recovers a fund for the benefit of others; or (2) a court may award fees as a sanction for willful disobedience of an order. Id. at 257-58. Nevertheless, the Alyeska decision squarely rejects the argument that courts may award attorneys' fees "whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." Id. at 262. Fee-shifting is a "policy matter that Congress has reserved for itself." Id. at 269.

Congress did not provide for the recovery of attorneys' fees in the ACAA. In fact, the ACAA does not even expressly provide a private right of action. "To conclude that a provision that only impliedly authorizes suit nonetheless provides for

attorneys' fees with the clarity required by Alyeska would be . . . unprecedented." Key Tronic Corp. v. United States, 511 U.S. 809, 818 (1994). Attorneys' fees are not available in suits brought under the ACAA.³

II. The City's Petition for Attorneys' Fees

The City requests an award of \$22,012.44 for attorneys' fees. The City simply states that it is a "prevailing party" under the ADA, 42 U.S.C. § 12205, and thus it is entitled to a fee award. In order to recover fees, a prevailing defendant must show that the plaintiff's suit was "frivolous, unreasonable or without foundation." Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). Attorneys' fees are not awarded simply because the plaintiff lost the case. Hughes v. Rowe, 449 U.S. 5, 14 (1980). The City did not file a brief explaining why this case is among the small class of cases in which a defendant is entitled to attorneys' fees. Nevertheless, considering the City's allegations at the hearing, I will briefly discuss the merits of the petition.

³ Alternatively, even if attorneys' fees were available under the ACAA, I am not satisfied that an award of fees would be appropriate in this matter. The Plaintiffs sought significant monetary damages and injunctive relief. They settled for \$1,000 each. (Rivera and Gambrell's ACAA claims were identical, logic dictates that the additional \$4,000 that Rivera received must have been in settlement of her negligence claim). The ACAA claims were settled for "nuisance value." While the Plaintiffs technically qualify as "prevailing parties," \$0 is a reasonable fee award under the circumstances of this case. See Farrar v. Hobby, 506 U.S. 103, 111-12 (1992).

The Plaintiffs alleged that the City violated the ADA by failing to provide access for individuals with disabilities and by providing "significant assistance" to an entity, Delta, that maintained discriminatory policies. The first theory was rejected because the Plaintiffs' factual allegations did not amount to a violation of any duty the City owed to the Plaintiffs under the ADA. The second theory was rejected because I found that the City's leasing of property to Delta did not qualify as "significant assistance" under the ADA.

While the Plaintiffs' case did not survive a motion to dismiss, it is also not a case that justifies a fee award to the defendant. The ADA is a relatively new statute and the law relating to it is still developing. The Court must be cautious not to chill suits to enforce civil rights. Baby Doe v. Methacton Sch. Dist., 920 F. Supp. 78 (E.D. Pa. 1996). The Plaintiffs' "significant assistance" theory was not so unreasonable as to justify fees.

The City did not meet its burden of showing that the Plaintiffs' case was "frivolous, unreasonable or without foundation." Therefore, the City's Petition for attorneys' fees is denied.

III. Voluntary Dismissal of Jewell

Jewell requested voluntary dismissal of her claims with prejudice. Delta did not oppose this request. The City opposed the request because it believed that the withdrawal would

preclude this Court from ordering Jewell to pay the City's attorneys' fees. Now that the City's fee petition has been denied, there is no reason for opposition to Jewell's withdrawal. Jewell's request to withdraw her claims, with prejudice, is granted.

IV. Supplemental Jurisdiction over Rivera's Negligence Claim

After this Court's September 26, 1997 memorandum and Delta's offers of judgment, the only substantive claim remaining is Rivera's state law negligence claim against the City. The Supplemental Jurisdiction statute, 28 U.S.C. § 1367(c), states:

(c) The district courts may decline to exercise supplemental jurisdiction over a claim . . . if - . . .

(3) the district court has dismissed all claims over which it has original jurisdiction

The parties briefed the issue of the Court's supplemental jurisdiction over Rivera's negligence claim before Delta made its offers of judgment. The Plaintiffs argued that the court should exercise its discretion and retain jurisdiction in order to avoid a "multiplicity of actions" in state and federal court. After Delta's offers of judgment, Plaintiff's argument is moot. Rivera's negligence claim is dismissed.

CONCLUSION

Rivera is entitled to \$2,091.40 and Gambrell is entitled to \$333.20 for costs. Plaintiffs' request for attorneys' fees is denied. The ACAAA does not provide for the recovery of attorneys' fees.

The City's petition for attorneys' fees is denied because the City did not show that the Plaintiffs' case was unreasonable. Thus, there is no reason for the City to oppose Jewell's request for voluntary dismissal. Since all of the federal claims have been disposed of, I will not exercise supplemental jurisdiction over Rivera's negligence claim against the City.

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ORDER

And NOW, this Day of February, 1998, upon consideration of Plaintiff Eunice Rivera's Petition for Reimbursement of Costs, Inclusive of Attorneys Fees; Plaintiff Viola Gambrell's Petition for Costs and Attorneys' Fees; Defendant City of Philadelphia's Petition for Payment of Attorneys' Fees; Plaintiff Verna Lee Jewell's Request to Voluntarily Discontinue Her Claim With Prejudice; the parties' briefs regarding the Court's supplemental jurisdiction; and the responses thereto, it is hereby ordered:

1. Plaintiff Eunice Rivera's Petition for Reimbursement of Costs, Inclusive of Attorneys Fees is GRANTED IN PART, AND DENIED IN PART; Rivera is awarded \$2,091.40 for costs;

2. Plaintiff Viola Gambrell's Petition for Costs and Attorneys' Fees is GRANTED IN PART, AND DENIED IN PART; Gambrell is awarded \$333.20 for costs;

3. Defendant City of Philadelphia's Petition for Payment of Attorneys' Fees is DENIED;

4. Plaintiff Verna Lee Jewell's Request to Voluntarily Discontinue Her Claim With Prejudice is GRANTED;

5. Plaintiff Rivera's negligence claim against the City of Philadelphia is DISMISSED.

Judgment is entered in favor of Plaintiff Eunice Rivera and against Defendant Delta Airlines, Inc., in the amount of \$2,091.40. Judgment is entered in favor of Plaintiff Viola Gambrell and against Defendant Delta Airlines, Inc., in the amount of \$333.20.

BY THE COURT:

JAMES MCGIRR KELLY, J.